

**Headquarters U.S. Air Force
Center for Environmental Excellence**

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What is a Manager to Do?

Basic Consultation

***Requirements of ARPA
and NAGPRA***



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9/5/2002

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Presented in the Native American Legal Issues I Symposium at the Department of Defense Conservation Conference, Tucson, AZ, 17-21 June 2002.

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DOD Policy, ARPA and NAGPRA

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- ***DOD will meet its responsibilities to Tribes***
- ***Responsibilities are derived from Federal laws (including ARPA, NAGPRA, etc), treaties, agreements, policies, and Executive Orders***
- ***ARPA, Section 9, mentioned in the context of protecting Tribal information about sacred sites, although Annotated version of Policy cautions that installations might not be able to keep such information confidential in the face of FOIA***
- ***Policy defines and outlines intentions, limits, and protocols for complying with Federal laws in regard to American Indian relations***

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What does the DOD American Indian and Alaska Native Policy say about ARPA and NAGPRA? Highly recommend the annotated version of the **DOD American Indian and Alaska Native Policy**, which is the subject of this slide.



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ARPA 101

- ***Archaeological Resources Protection Act of 1979***
- ***How to Comply? Essentially, Protect Archaeological Sites on Federal Land***
- ***Not only National Register eligible sites, but ALL archaeological resources older than 100 years that are of “archaeological interest” [32 CFR 229.3]***
- ***Protect from: Vandalism, Looting, Erosion, Disturbance or Destruction by development, etc***
- ***Establishes criminal penalties for disturbing archaeological resources without an ARPA permit (except during construction, farming, etc)***
- ***Really is “Anti-Looting” Law***

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Archaeological Interest means “capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics...”



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ARPA 101 (Continued)

- ***ARPA permit allows qualified researchers to conduct scientific studies on Federal land***
- ***Federal Cultural Resources Managers do not need ARPA permits to conduct their official duties***
- ***Contractors do not need ARPA permits to conduct archaeological work specified in Federal contracts because they are acting under the direction of the Federal land manager [32 CFR 229.5(c)]***
- ***Federal land managers issue ARPA permits for archaeological research on lands they control***

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Air Force: ARPA permits signed and issued by Base Commander, Wing Commander, Base Civil Engineer, or Environmental Manager (AFMC), per revised AFI 32-7065 (not yet adopted)



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ARPA and American Indians

- **Notification:** Federal agencies must notify affiliated Indian Tribes of a pending ARPA permit:
 - **IF:** Issuing an ARPA permit might result in harm or destruction of any Indian tribal religious or cultural site on agency controlled land [32 CFR 229.7]
 - At least 30 days prior to issuing an ARPA permit
- **Consultation:** If requested during the 30 day period, FLM may meet Tribal representatives to discuss ways to avoid or mitigate potential harm to sites with religious or cultural significance
- **Identification:** Agencies must seek to identify all Tribes with aboriginal or historic ties to land

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FLM: Federal Land Manager. In Air Force generally means Base or Wing Commander, although in this case may be Base CRM, if government-to-government relations already have been established. Identification requirement is very important to accomplish early before any ARPA or NAGPRA issues arise.

Identification of appropriate Tribes, per 32 CFR 229.7(b)(1)



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NAGPRA 101

- ***Native American Graves Protection and Repatriation Act of 1990***
- ***Along with AIRFA, NAGPRA is CIVIL RIGHTS LAW and not Historic Preservation Law***
- ***Intersects with and sometimes parallels Historic Preservation laws: ARPA and NHPA***
- ***NAGPRA concerns only four kinds of objects:***
 - ***Native American Human Remains (only!)***
 - ***Funerary Objects***
 - ***Sacred Objects***
 - ***Objects of Cultural Patrimony***

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43 CFR 10 makes clear that ONLY Native American remains [see definition of Native American in Act, Section 2(9)] are included and covered by NAGPRA and 43 CFR 10. Specific references: Supplementary Information for Section 10.3 (43 CFR 10: page 18); Supplementary Information for Section 10.4 (43 CFR 10: page 23); 43 CFR 10.1(b)(2); and 43 CFR 10.2(d) and 10.2(d)(1).



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NAGPRA Definitions

- ***Native American Human Remains: skeletal elements***
- ***Funerary objects:***
 - ***Associated Funerary Objects***
 - ***Unassociated Funerary Objects***
- ***Sacred objects: "Specific ceremonial items needed by traditional Indian religious leaders for the practice of traditional religions by present day adherents" [43 CFR 10.2(d)]***
- ***Objects of Cultural Patrimony "have ongoing historical, traditional, or cultural importance central to the Indian Tribe itself, rather than property owned by individuals" [43 CFR 10.2(d)]***

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Associated funerary objects: Items placed intentionally with NA remains as part of death or burial rites, or are known to have been made exclusively for burial or to contain human remains.

Unassociated funerary remains: Not now associated with NA human remains, but thought to have once been directly and purposely associated with burials or remains.

Indian Tribe: Used here to refer to Federally Recognized Tribes, Alaska Natives, and Native Hawaiian Organizations.



Five Essential NAGPRA Actions

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- ***Summaries of Federal artifact collections that might contain NAGPRA remains or objects***
- ***Inventories, item-by-item descriptions of human remains and associated funerary objects in Federal collections***
- ***Process for Intentional Archaeological Excavations of NAGPRA remains or objects***
- ***Process for Inadvertent Discovery of NAGPRA remains or objects***
- ***Transfer custody of NAGPRA remains or objects***

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Transfer custody of NAGPRA items excavated or discovered after 1990.

Repatriate NAGPRA items in collections made prior to 1990 [which are considered to have been de-patriated from Indian lands and control]

Of course all these actions are associated with Consultation



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Summaries and Inventories

- ***Both are associated with Consultations to determine what and to whom to Repatriate NAGPRA items in collections made prior to 1990***
- ***NAGPRA required Federal agencies to complete summaries in 1993, and inventories before the end of 1996***
- ***Most Air Force collections did not contain NAGPRA remains or objects***

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Intentional Excavation

- ***Intentional excavation of NAGPRA items allowed IF:***
 - ***Objects are excavated and removed following ARPA***
 - ***FLM has consulted appropriate Indian Tribes***
 - ***Disposition of objects is consistent with NAGPRA and 43 CFR 10.6***
 - ***Proof of consultation or consent is shown prior to FLM issuing an ARPA permit, or agency conducting work with its own archaeologists***
- ***Process:***
 - ***Take reasonable steps to determine whether a planned activity will result in intentional excavation of NAGPRA items [ethnography, historical research]***

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Intentional excavation for scientific research or for data recovery in Section 106 review process. NAGPRA is not meant to halt archaeological research on Federal lands.



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Intentional Excavation (2)

- ***Process (continued)***
 - ***Notify in writing Tribes that are likely to be culturally affiliated with any NAGPRA items recovered***
 - ***Meet and consult with appropriate Tribal officials to discuss the activity, treatment, and disposition of NAGPRA items***
 - ***Complete a written Plan of Action, signed by the FLM [Tribal signatures not required (43 CFR10.5(e))]***
 - ***Provide a copy Plan of Action to appropriate Tribes***
 - ***Execute Plan of Action, including transferring NAGPRA items to appropriate entities***

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Obvious that PRIOR knowledge is very helpful to identify Tribes likely to be affiliated or that were aboriginal occupants of agency lands [see ARPA requirement for such identification, Slide 5, per 32 CFR 229.7(b)(1)].

43 CFR 10 specifically cites final judgments of the Indian Claims Commission and the US Court of Claims as definitive sources for determining which Tribes were aboriginal occupants. Also use ethnographic and historic research to make determinations.



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Inadvertent Discovery

- **Cease activity near the discovery and protect the remains**
- **Identify: Ensure that the remains are covered by NAGPRA (if not, likely covered by ARPA, NHPA)**
- **Notify: Once determined are NAGPRA remains, Finder must:**
 - ***Immediately notify by phone (with written confirmation) the responsible Federal official (usually the installation CRM on AF land)***
 - ***CRM immediately notifies the Base or Wing Commander***

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Identifying Native American remains vs Euro-American or other non-NA remains is very important [otherwise agency's might misuse NAGPRA and violate Civil Rights of other groups of Americans]. Identification might be obvious at discovery, or it might require good archaeological work at the site and good faith effort to determine whether the preponderance of evidence indicates remains are either Native American or non-Native American.

Some inadvertently discovered human remains should be reported to law enforcement authorities to determine if they are related to modern criminal activity. Again, good archaeological techniques and records will help resolve the identification.



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Inadvertent Discovery (2)

- **Certify and Notify: The Commander must:**
 - ***Certify receipt of the discovery notification within 3 working days [this certification starts 30 day period]***
 - ***Take immediate steps to further secure and protect the discovery***
 - ***Notify by telephone, followed by letter, the Tribes likely to be culturally affiliated with the remains or objects:***
 - ***43 CFR 10.5(b) requires the Commander to take appropriate steps to identify the lineal descendant or Tribe entitled to custody of the remains or objects (similar to ARPA Identification requirement)***
 - ***Those entitled to custody are the appropriate groups to notify***
 - ***Letter should propose time and place for consultations***

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Prior ethnographic, historical, and legal work is very helpful to identifying lineal descendants and appropriate Tribes for consultation, as noted on a previous slide.



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Inadvertent Discovery (3)

■ **Consult**

■ ***Priority for Custody [hence for consultation]:***

- *Lineal descendants, or*
- *Aboriginal occupants of the land, or*
- *Tribes who are, or are likely to be, culturally affiliated with the NAGPRA items discovered, or*
- *Tribes with a demonstrated cultural relationship with the NAGPRA items*

■ ***Provide to Consulting Parties:***

- *List of all lineal descendants and Tribes being consulted regarding the particular NAGPRA items*
- *An indication that more information will be provided on request*

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See 43 CFR 10.6 for details of priority for custody entitlement.



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Inadvertent Discovery (4)

- **Consult (continued)**
 - ***Request from Tribes:***
 - *Name and address of representative for consultation*
 - *Names and appropriate methods to contact lineal descendants to include in consultation*
 - *Recommendations on how to conduct consultation*
 - *Kinds of cultural items the Tribe considers likely to be unassociated funerary objects, sacred objects, or objects of cultural patrimony*
 - ***Consult to develop a Plan of Action if the NAGPRA items must be excavated or removed***
- **Resume activity no sooner than 30 days after notification was certified by Commander**

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Exception to 30 day cessation rule: Activity can resume at any time a Plan of Action or other agreement is developed with the appropriate lineal descendants or Tribes.



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A Plan of Action Describes

- ***Kinds of objects considered cultural items***
- ***Specific information used to determine custody***
- ***Planned treatment, care, handling of recovered NAGPRA remains or objects***
- ***Analyses proposed for each kind of NAGPRA item***
- ***Steps to contact Tribal officials if more Inadvertent Discoveries***
- ***Traditional treatment to be afforded human remains***
- ***Nature of reports to be prepared***
- ***Planned disposition of the NAGPRA items***

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These are the minimum requirements for Plans of Action [see 43 CFR 10.3(2) and 43 CFR 10.5(e)].



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Plan of Action (2)

- ***Commander signs the Plan of Action***
- ***Tribal signatures are not required [43 CFR 10.5(e)]***
- ***Provide a copy of signed Plan of Action to appropriate lineal descendants or Tribes***
- ***Execute the Plan of Action***
- ***Ensure the eventual custody transfer of the remains and objects follows 43 CFR 10.6***

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Reason that Tribal signatures are not required is that the Plan of Action is supposed to reflect Tribal desires, discussions, and agreements, which the Commander is signing on to by agreeing to comply with the Plan of Action.



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Custody

- **Agency must determine appropriate custody**
 - **Tribes and lineal descendants must provide information to substantiate their claims [43 CFR 10.10(a) and (b)]**
 - **Determine Aboriginal occupants of lands:**
 - Indian Land Claims Commission final judgments
 - US Court of Claims judgments
 - Ethnographic and historic research
 - **Conflicting Claims? [see 43 CFR 10.6(c), 10.15(a)(2), and 10.17]**
 - Use preponderance of evidence to determine claimant with strongest demonstrated relationship to items, or
 - Wait until claimants work out custody among themselves, or
 - Wait until matter is settled in a court of competent jurisdiction

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Agency is responsible for determining entity entitled to custody. Document the decision, if not already subject to the Plan of Action. Do not transfer custody if any disputes arise, but hold the NAGPRA items in a secure, safe, and appropriate location until the dispute is resolved. Best if agency encourages claimants to settle custody disputes without agency involvement.



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Transfer of Custody

- ***Custody decision and notice of proposed disposition must be published at least twice, at least one week apart, in local and regional newspapers***
- ***Notice, dates, and names of publishing newspapers must be sent to the Departmental Consulting Archaeologist, NPS, Washington DC***
- ***Actual transfer of custody cannot occur until at least 30 days after last notice is published to allow additional claimants to come forward***
- ***Transfer must respect customs and practices of appropriate lineal descendants or Tribes***
- ***See 43 CFR 10.6 for details***

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In most cases all aspects of the transfer will be described in the Plan of Action. Many practitioners assume that the notice proposing custody transfer must be published in the Federal Register. This is not true. Only repatriation notices (for collections and items collected prior to 1990) must be published in the Federal Register. Custody transfer notices are published on local and regional newspapers as described on the slide.



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Need Help and Advice?

- **Air Force:**

- Dr. James D. Wilde, HQ AFCEE/ECS, DSN 240-6546,
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- MS. Julia Cantrell, HQ AFCEE/ECS, DSN 240-3515.
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- **National Park Service:**

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Note: National NAGPRA Program officers email names format: paula_molloy
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